IN THE

Supreme Court of the United States.

OCTOBER TERM, 1898.

No. 136.

ADOLPH COHN, APPELLANT,

vs.

ANGELINA DAILY ET AL.

BRIEF FOR APPELLANT.

STATEMENT OF THE CASE.

This is an appeal from a judgment of the supreme court of Arizona affirming a judgment of the district court of said Territory in and for the county of Cochise, confirming in the appellee title to certain mining claims, the value of which is over five thousand dollars (Trans., pp. 106, 107), which said appeal was duly allowed (Trans., p. 120).

In the years 1886 and 1889, inclusive, one James Daily located, under the mining laws of the United States, the mining claims, title to which are in controversy in this action. Within the years stated, or at some time within said

dates, he was living with a woman born in Hermosillo, Mexico, whose name, as the transcript shows, was Angela Dias.

James Daily left the jurisdiction of the court about the 11th day of April, 1890, being a fugitive from justice, having killed a man by the name of Lowther, at the town of Bisbee, Arizona, on the date above mentioned. In Colorado he met an acquaintance, from Arizona, by the name of A. J. Mehan, one of the parties to this action, and transferred by deed, absolute, to Mehan the property described in the complaint. Mehan was at this time indebted to the plaintiff Cohn, the appellant here, and when the deed from Daily to Mehan was recorded the appellant Cohn caused by proper suit an attachment to be levied on the property conveyed by such deed. The appellant claims title to the property in controversy by virtue of that attachment merged into a judgment, which judgment was the basis of a judicial sale and a deed (after expiration of the time for redemption) to the plaintiff Cohn, he having been the purchaser at such sale. At the time of the levy of the attachment and at the time of the sale under the judgment and up to the time of the deed by the officer of the court to Cohn, A. J. Mehan, the defendant in the judgment, was the holder of the legal title to the mines sued for by virtue of a deed from Daily to him, which deed was executed by Daily before any liens had attached and before any suit affecting the property had been brought or *lis pendens* filed. Daily acquired title by location, notices of which are in evidence (Trans., pp. 20–29, inclusive).

The defendant Mrs. Daily seeks to defeat the effect of this deed to Cohn by setting up that she was the equitable owner of the mining claims deeded by Daily to Mehan.

Mehan, after the levy of the attachment by Cohn, transferred the claims in controversy or certain interests therein to Turner, Chandler, and Fisher, residents of the State of

Colorado, and hence those three persons are made parties defendant in the present case (Trans., p. 8).

There was no opinion filed by the court in this case, nor does the record show on what grounds the judgment was based. The record does show, however, that the court decided the case first in favor of appellees, then in favor of appellant, and then again for appellees, which last judgment, it is contended, was without authority (Trans., pp. 116, 117, 118).

ASSIGNMENT OF ERRORS.

And now comes the appellant, Adolph Cohn, and alleges that there is manifest error in the record and proceedings in said cause in the supreme court of the Territory of Arizona as follows, viz., to wit:

I.

The court erred in affirming the judgment of the district court in said cause.

II.

The court erred in not reversing the case upon the errors assigned to the record and proceedings in the district court in said cause.

III.

The court erred in that it did not reverse the case and direct the court below to render judgment in favor of plaintiff.

IV.

The court erred in that it did not reverse the case and direct the court below to render motion for a new trial.

V.

The court erred in that it did not reverse the case on the ground that the evidence did not sustain the judgment, and for that reason to set aside the judgment below.

VI.

The court erred in that it did not direct the court below to render the judgment for the plaintiff, as prayed for.

VII.

The court erred in holding that the evidence sustained the resulting trust in favor of Mrs. Daley, appellee.

VIII.

The court erred in holding that under the evidence there was an express trust in her favor proven by parol varying a deed absolute.

IX.

The court erred in not sustaining the various assignments of error to the record of the trial court.

Appellant therefore prays that the judgment of said supreme court be reversed with such direction as the court may determine in the premises.

The assignment of errors from the trial court to the supreme court of Arizona are printed on page 88 of the Transcript, and are here inserted.

1st. The court erred in admitting in evidence the deposition of A. J. Mehan; which deposition is irrelevant to any issue in the pleadings and should have been excluded because it contained statements invalidating his title and is otherwise irrelevant and incompetent (Rec., p. 48).

2d. The court erred in refusing to allow testimony contradicting statements in Mehan's deposition (Broad's testimony, Rec., p. 71).

3d. The court erred in refusing to permit the evidence of defendant Mrs. Daley, given before the coroner's jury in the inquest held on the body of one Lowther, which testimony tended to show she was never married to Daley, and on the further ground that the said testimony given by her before the coroner tended to contradict the statements made by her on the trial of this cause (Trans., p. 73).

4th. The court erred generally in admitting improper evidence and in refusing to admit competent evidence; to which ruling exception was taken at the time.

5th. The judgment should be set aside and a new trial granted because not sustained by evidence, in that—

(*a.*) The evidence does not support judgment, because there is no evidence showing any facts which in law creates a resulting trust in favor of the defendant Mrs. Daley.

(*b.*) The evidence fails to show that plaintiff had any actual or constructive notice of any equities in the defendant Mrs. Daley at the time of the attachment by plaintiff Cohn or at the time of the purchase of the property by him.

(*c.*) The evidence, on the contrary, shows that plaintiff was an innocent purchaser for a valuable consideration without notice.

(*d.*) The evidence shows that any money advanced by Mrs. Daley was a loan, and no trust could result in her favor.

(*e.*) The testimony of Mrs. Daley shows at best that it was community property and not separate estate.

(*f.*) There is no testimony tracing the money claimed by Mrs. Daley's attorney as her separate property into any particular piece of property in controversy in this suit.

(*g.*) Mrs. Daley's evidence shows that she and Daley located the property after marriage, and such act made the

property community property, subject to *any* disposal of the husband. (See Trans., p. 54.)

(*h.*) The evidence shows that all money expended by Mrs. Daley was for support of the family and for assessment-work on the mines, no trust resulting. (See Trans., p. 54.)

6th. The court erred in admitting in evidence the record in the divorce suit of Daley *vs.* Daley.

7th. The court erred in admitting in evidence the record in Daley *vs.* Daley *et al.*, the plaintiff in this cause not being bound by it, being no party to it.

8th. The court erred in refusing to permit plaintiff to show that Mr. and Mrs. Daley were not husband and wife at the time of the location of the claims in controversy.

9th. The court erred in admitting in evidence the *lis pendens* filed by Mrs. Daley after Cohn's attachment and lien in a suit to which Cohn was not a party.

10th. The judgment is not supported by the evidence, in that—

(*a.*) Mehan's testimony is irrelevant and incompetent.

(*b.*) Even if relevant it was broken down by testimony as to his reputation for truth and by proof of contradictory statements made elsewhere.

(*c.*) The burden of proof being on defendants to show a trust in favor of Mrs. Daley, there is no evidence in the record tending to show facts from which any trust could result.

11th. The evidence shows that plaintiff Cohn was, at the time of filing his suit, the owner of the property described in the complaint.

12th. The court erred in overruling the motion for new trial (Trans., pp. 16–18).

ARGUMENT.

In order to a clear understanding of the foregoing assignment of errors, it is necessary to give in chronological order the various suits brought in efforts to extinguish the title held by Mehan and the history of those suits, and then examine the facts surrounding them, from which we hope to show that Cohn at the time he brought this suit was and now is the owner of the mining claims in controversy herein.

The record partly shows, and would if we had been permitted have fully shown, the following original facts:

One James Daley located between the years 1885 and 1889 the properties described in the complaint. On April 11, 1890, he killed a man by the name of Lowther and fled the country, since which time he has never been within the jurisdiction of the court. While such fugitive from justice he by deed, absolute and unconditional, transferred the property to A. J. Mehan, whom he met in Colorado. Mehan at the time was indebted to the plaintiff below, the appellant here, Cohn, who when the deed was recorded in the proper office in Cochise county, Arizona, brought suit against Mehan, and caused on the 13th day of September, 1890, an attachment to issue, which on the same day was levied on the property in controversy and filed with the county recorder, and under the Arizona statute became a lien on the property from the date of levy and filing.

On October 15, 1890, Angela Diaz, who had been living and cohabiting with Daley, brought a suit against him to have a marriage declared, and in the same suit to obtain a divorce and a decree giving her HALF the property.

On May 14, 1891, judgment was rendered in accordance with the prayer (Trans., p. 43).

On October 18, 1890, Mrs. Daley brought suit against

Mehan and others to whom Mehan had transferred interests in the claims, and filed a *lis pendens*. In this suit the complaint charges that Daley never executed the deed to Mehan. That complaint set up no declaration of a trust at all. Long after filing the *lis pendens* the complaint was amended, setting up other grounds.

On May 26, 1892, judgment was rendered in the case (Trans., p. 44), long after complaint was filed by Cohn in the case at bar and not more than one or two days before the commencement of its trial in the court below.

On these facts only two questions arise for adjudication:

1st. Does any trust under the facts shown by the testimony exist in favor of appellee Angela Dias which was a charge on the deed from Daley to Mehan?

2d. Was appellant concluded by the judgment in the case of Angela Dias *vs.* A. J. Mehan *et al.*, to which Cohn was not a party?

To the first question, Does any trust result from any evidence in the case?

Her equities as she asserts them are of two kinds. She first attempts to set up a resulting trust, declaring that the mines were purchased, operated, and developed with her money, and the title ought to have been in her and was not. She utterly fails to make out a resulting trust. The only testimony on the question was given by her (Trans., p. 53). She did not furnish the money to purchase the mines, as the whole record shows they were located by Daley and no money was required or could have been used in obtaining title. Paying out money for assessment-work on a mine creates no trust in favor of the person advancing the money. Besides, if appellee and Daley were in fact husband and wife, their joint labor in protecting the title leaves the mines community property at best over the disposition of which the husband had full control. He could deed it as

he pleased; it was subject to sale for his debts. If they were not husband and wife, then by her own testimony she could claim no more than the money actually advanced in doing the assessment-work on the mine.

A resulting trust is a trust which arises by operation of law, where an agent uses the money of his principal to buy real estate and takes the title in himself. Its essence is the operation of law at the time of the purchase and acquiring title, and the title to the real estate by resulting trust is at once the equitable estate of the person in whose favor the resulting trust arises by operation of law.

Washburn Real Prop., vol. 2, 175 (7th ed., p. 447, and cases cited).

The evidence in this case shows that these people were never married, as required by the statute, but only became husband and wife by living together. The evidence is uncertain as to when this marriage relation began. The Revised Statutes, sec. 2095, provides that all persons who have heretofore lived together as husband and wife and shall continue to live together for one year from the date of the act taking effect, etc., shall be considered as legally married. The act took effect July 1, 1887. Under that statute they were not legally married until July 1, 1888. Long before that time the George Washington, Old Republican, Irish Mag, Copper Monarch, and Angel mining claims had been acquired by location, and the title to the same were in Daley. So from the evidence they were not living together at the time of the location of these claims, or, if they were, they were not married. But a resulting trust might arise just as much to a person who was not the wife as to one who was the wife, so that does not become very material.

The evidence in the case shows that when they commenced to live together she had $3,000. They lived together five years, and this $3,000 was used in building a house, which they lived in, on the George Washington claim

and in the purchase of provisions and clothing. All of the supplies for this woman and the man Daley during the five years were paid for with this money. The evidence shows during that time some work was done on these claims and the title kept up. Whether $100 worth of work was done each year or not the evidence does not disclose. Be that as it may, he continued to work upon the mines to such an extent that no one intervened by another location, and the title to the mines was retained by Daley.

She says she was present when the mines were located and held the tape-line for measurements and helped build the monuments. Such evidence as this does not make out a resulting trust.

The title to these mines was not acquired by virtue of her money; was not acquired by Daley as her agent. They were acquired by Daley as a citizen of the United States who had discovered ore and who had located the same. They were acquired under an act of Congress that gives the right to locate such claims, and no money is required to acquire such title; simply the performance of certain acts required by the statute, and these acts may be performed without expense. It is not based on a money consideration. It is a grant by Congress. Besides, the evidence shows that Mrs. Daley could not have been the owner of the mines, because under the act of Congress no one but a citizen of the United States can make a valid location of mining claims. The evidence shows she was born in a foreign country, to wit, Sonora, Mexico, and there is no evidence that she ever became naturalized by operation of law or adjudication of a court; hence she could not have owned an interest in these mining claims. It was therefore impossible for her to have had a resulting trust in these mining claims at the time of the location thereof. If her money was used in work and labor on the mines thereafter and in improving and developing the same, that cannot be the basis of a resulting trust.

Washburn, *supra*.

The inference where money is expended by people living together as husband and wife is, that property acquired is community property, and, even if a trust could be inferred between strangers, it will not in this case.

Second. She claims that there is an express trust which grows out of the facts stated in the deposition of Mehan. The deposition of Mehan in effect states that at the time Daley conveyed the legal title to him by an absolute deed that he, Daley, said he made this deed to him in order that he might hold the title and sell the mines, so that his wife could have the proceeds and the benefit of the same, he to take out his expenses in negotiating and selling the mines. This, if anything, is an express trust made by a grantor in favor of a third person, resting entirely in parol and in violation of the terms of the deed, which is absolute in form, with an addendum clause that the title should be held by Mehan for his own use and benefit.

Many cases and most of the law which was read and referred to below by counsel on the other side in argument is drawn from conceded facts. For instance, it is stated that a purchaser at a judgment sale purchases subject to existing equities, and that if an express trust existed in favor of Mrs. Daley that this trust can be asserted against a purchaser with notice. What is here meant by existing equities? If the deed from Daley to Mehan had said that Mehan was to have and to hold the said real estate for the use and benefit of Mrs. Daley, then there would have been an express trust contained in the deed, and, of course, all purchasers thereafter would have been subject to that trust. The question here is not as to the effect of a trust, if it exists, but whether there was a trust at all. We insist that an express trust, such as is sought to be asserted by the evidence of this deposition of Mehan, cannot exist in parol to vary a deed absolute in its terms. This is the exact point of the controversy.

If authorities can be found for this doctrine, we have failed to find them.

We refer to Perry on Trusts, vol. 1, sec. 76.

"Oral proof cannot be heard, to engrave an express trust on a conveyance absolute in its terms," referring to—

Kelly *vs.* Karsner, 72 Ala., 110.
Lawson *vs.* Lawson, 117 Ills., 98.
Philips *vs.* South Park Com'rs, 119 Ills., 626.
Green *vs.* Cates, 73 Mo., 122.
Hansen *vs.* Berthelson, 19 Neb., 433.
Cain *vs.* Cox, 23 W. Va., 594.
Pavey *vs.* Amer. Ins. Co., 56 Wis., 221.
Abbott's Trial Evidence, p. 238.

"But if a written agreement between the parties appears, manifesting an intent to make an absolute conveyance, parol evidence is not competent between them to prove that a trust was intended, unless fraud or mistake is shown."

The same author, referring to resulting trusts, says:

"To establish a resulting trust, it must appear that the consideration was paid at or before the time of the conveyance," referring to

St. John *vs.* Benedict, 6 Johns' Ch'y, 111.
Sturtevent *vs.* Sturtevent, 20 N. Y., 39.
Horn *vs.* Ketaltas, 46 N. Y., 605.

In Rhine *vs.* Ellen, 36 Cal., 372, it is laid down that a covenant in writing cannot be contradicted or opposed in their legal consideration by facts *aliunde*, and lays it down that an express trust cannot be asserted against a deed absolute in form.

The case cited by counsel in argument (Potter *vs.* Hyland, 27 Pac. Rep., 1108) and the case of Bowle *vs.* Curler, *ib.*, 226, which is the last case reported from California, lays down the same proposition, to wit, that where a deed is ab-

solute on its face it cannot be varied and an express trust declared against it by parol in the absence of fraud. So California, from volume 36 down to the last reported decision, stands arrayed on that side unequivocally. See also Bryson *vs.* Bryson, 17 Pac. Rep., 690, to the same effect.

Brown on the Statute of Frauds, in discussing the fourth section of the act, which applies to trusts, says that that section has been adopted in most of the States, and the only exceptions he knows of are Virginia and Kentucky. The fourth section of the statute of frauds has been adopted in most of the States and has been adopted in this Territory, and is found in section 2030 of our Revised Statutes. The language of our statute is:

"Any contract for the sale of real estate for a longer term than one year shall be in writing."

Now, if a contract be in writing and it is sought to vary that contract by parol, it would clearly be in violation of that section. It is held that section 4 is a prohibition against any contract or any trust growing out of any agreement by the parties, unless it be in writing, without regard to the seventh section.

With this fourth section in force, the only trusts which could exist by parol are trusts which arise not by contract or by agreement of parties, but by operation of law, such as resulting trusts or trusts of that character.

Courts also have power in equity to reform a contract made in writing and make it correspond to the intent of the parties by making a new contract in equity; but that is not asserting a trust. It comes under the principle of the powers of the court where, by mistake or fraud or accident, the contract does not express what was the real intent, the court may make it do so. In the case at bar there is no evidence of fraud. Mr. Daley did with Mehan just what he wanted to do, and Mr. Mehan accepted the title just as Daley wanted him to do. There was no fraud, accident, or mistake in the transaction. Mr. Daley made a deed absolute

upon its face and delivered it to Mehan. That was exactly the thing he then wanted to do. Mehan states, however, if he is to be believed, that Daley wanted him to do certain things, which Mehan might or might not do as he saw proper; but Daley cannot be heard to say against the creditors of Mehan and this judgment that Mehan did not have title. Daley is estopped by his deed and Mehan cannot be heard to deny that he owned the property which he accepted the title to, and a stranger cannot assert a trust to enforce or reform or modify a contract, nor can he assert that there was any fraud, accident, or mistake between Daley and Mehan, whose transaction was just as they wished it to be. Hence the whole question turns squarely and flatly on the question of whether under such circumstances a trust can be declared outside the terms of a deed for the benefit of a third person who was no party to it.

The doctrine under which a deed absolute is held to be a mortgage does not come within the principles of express trusts. It has grown up to be a separate equity jurisprudence and stands upon principles of its own, and is an exception to the rule. It had its origin in the equitable jurisdiction to prevent fraud by a creditor receiving a deed without having written in it a condition of defeasance. Its origin was in the domain of equity to correct fraud; and, having its origin there, it has grown into a jurisprudence of its own.

Jones on Mortgages, vol. 1, sec. 284, and sections following and cases cited.

Greenleaf on Evi., vol. 1, 266, in considering the fourth section of the statute of frauds: "The statute further requires that the declaration or creation of trusts of land shall be manifested and proved only by some writing, signed by the party creating the trust."

Gee *vs.* Thrailkill, 25 Pac., 588, is on all fours with this case, and the statutes of Kansas the same—that is, the fourth section of the statute of frauds.

Daily *vs.* Kinsler, 47 N. W., 1045, and cases cited.
Here statute is the same as ours is. Same decisions under same statute have been made in Michigan cases cited in Daily *vs.* Kinsler, and likewise in Minnesota.

The trust sought to be asserted here is a secret trust resting in parol and in conflict with the record, and it is admitted that Cohn had no actual notice of the existence of the trust. It has been asserted that he had notice of Mrs. Daley's claim, whatever it might be, by the fact that she was in possession of these mines. The evidence shows that she lived in a house which was on the George Washington claim, and hence the doctrine of her claim can apply to no other than to that claim, and we insist that her residence upon the claim does not charge Mr. Cohn with any notice of any claim on her part. She insists that she was the wife of Daley, and that she lived with Daley on this claim for five years as his wife, and that Daley ran away from said residence and she remained there. The fact that a wife lives with her husband in a house occupied by them as husband and wife can be held to give notice, not of any claim of the wife in the premises, but it would be notice that the husband had some interest in it. It can be no charge of notice of any separate claim of title from the fact that a wife lives with her husband upon and in possession of real estate, and when the husband absconds she remains in the family mansion. That notice would be to the very contrary of that claimed by counsel; it would be notice that Daley owned it, and when the record also discloses the fact that he owned it there can be no notice inferred or constructive notice drawn from the fact that she was in occupancy of the house alone after Daley went away; especially is this true where the attachment liens and all these questions arise shortly after he did abscond, only a few months having elapsed be-

fore the attachment suit was commenced. The only notice aside from that that is asserted and can be claimed by the parties is notice growing out of the *lis pendens* in the suit of Mrs. Daley *vs.* Mehan, Turner, and others.

In the first place, we assert that under the doctrine laid down by Freeman on Judgments, 4th ed., vol. 2, sec. 338, "The lien of the attachment merges into that of the judgment, and the conveyance relates back to the levy of the attachment, and transfers all the interest of the judgment debtor at that time."

And see cases cited.

67 Iowa, 106, and 10 Pa., 1.

So we are related to the levy of the attachment and are bound only by such notice as we had at that time. At the time of the levy of the attachment lien there was no constructive notice of the claim of Mrs. Daley. Shortly after, and the first constructive notice that can be charged against Cohn is the filing of the *lis pendens* in this case. *Lis pendens* only gives constructive notice of the allegations of the complaint in the suit in which the *lis pendens* is filed, to wit, the suit of Mrs. Daley *vs.* Mehan, Turner, *et al.* In the complaint in that case, which was filed at the time the *lis pendens* was filed, she did not assert a resulting trust in the mining claims she sought to recover, nor did she assert an express trust by virtue of the deed from Daley to Mehan. She asserted that her money had been used in the development of these mines to the extent of $3,000, and she was in equity entitled to $3,000, and that Daley was the owner of the value of the mines above $3,000; that was the extent of the trust she sought to establish by the suit in which the *lis pendens* was filed, and that is the trust we are charged with constructive notice of through the filing of the *lis pendens*, if anything at all. We are not charged with notice of the existence of an express trust between Daley and Mehan. This view will be verified by an inspection of the pleadings

as they existed at the time of the filing of the *lis pendens*. Being constructively charged with notice of that trust—that $3,000 of her money had gone into the development of the property, and that she was entitled to $3,000 out of these mines, and that Daley was entitled to the surplus—was an allegation of the trust which could not exist and an allegation of a trust which is not proved in this case, and hence we are charged with notice of that which the court must find from the evidence does not now exist and did not then exist.

Constructive notice can only be notice of a fact or of a claim which has a legal or an equitable basis and may be enforced. The trust, as it was alleged in that complaint, has never been enforced, is not alleged now, and is not the basis of any equity which is sought to be enforced, and we are not charged by that *lis pendens* with constructive notice of the trusts which are sought to be enforced in this case, and which are the only trusts that can defeat the claims of Cohn in these mines.

If this view be true—and it is to be determined by an inspection of these pleadings—then Cohn at the time of his purchase had no notice whatever of the existence of these secret trusts if the court holds that they existed at all.

Cohn is a judgment creditor of Mehan, and his lien attached at the time of the filing of his attachment and has existed ever since as a valid and existing lien by virtue of the registration laws and statutes as against every trust. If it shall be held that his lien only begins from the date of the filing and levying of his execution, then at that time he had no constructive notice, as is said above, of the trusts sought to be enforced in this case, and hence no constructive notice of any trust at all. He is then a creditor, and hence protected, and, as we insist, a purchaser for value without notice.

Upon this point we refer to Freeman on Judgments, 4th ed., vol. 2, sec. 366, and cases cited.

We refer particularly to the case of Halloway *vs.* Platner, 20 Iowa, 121 (89 Amer. Dec., 517), and Wood *vs.* Chapin, 13 N. Y., 509 (67 Amer. Dec., 62).

The complaint on which the *lis pendens* was filed alleges, with reference to the deed from Daley to Mehan, that the same was never made or executed by Daley and set up no declaration of trust at all. (See Trans., p. 91 *et seq.*)

An amended complaint which was filed long after the *lis pendens* was filed sets up other grounds, it is true, but the *lis pendens* cannot be invoked as constructive notice to Cohn of the allegations of the amended complaint, which are entirely different and based upon different grounds from those in the complaint on file at the time the *lis pendens* was filed.

As to the question whether a constable may levy on real estate, we refer to sections 568 and 569 of the Revised Statutes.

As to the description of the property in the constable's deed, we insist that it is a good description. The mines are described as certain mines in the Warren mining district, Cochise county, Arizona Territory, to wit, the George Washington, Irish Mag, etc., and reference is made for more certainty to the location notices on file in the recorder's office of Cochise county. We insist that this is a mere latent ambiguity. For instance, a deed in the case of Sargeant *vs.* Adams, 37 Gray, 72, conveyed "the Adams house" on Washington street, Boston, numbered 371, and it was held to be a latent ambiguity and could be shown by parol. In a case recently decided by the Supreme Court of the United States it was held that a devise of lot 3, in block 406, was a latent ambiguity, and parol evidence was admitted to show that lot 6, in block 403, was actually devised.

Patch *vs.* White, 117 U. S., 210.

A latent ambiguity may always be explained by parol.

Euliss *vs.* McAdams (N. C.), 13 S. E., 162.

Greenleaf Evi., vol. 1, sec. 297 *et seq.*

The evidence in this case on no ground can sustain any title in law or equity in Angelina Daley. She had $3,000, she says, when she married Daley. They lived together for five years, and she says that during that time Daley had no income, and that they lived off this money. That would be no more than $600 per year to board, feed, and clothe them.

Besides, she alleges in her complaint, page 91, Transcript, that she built a residence and improved a garden out of this same wide-reaching $3,000.

To say that mining claims acquired by him during that time by discovery and location and kept by his work are hers is absurd. They, if acquired after marriage, would be community property and his deed would convey them. This is conceding all she claims. If she is not his wife, then her claim is less equitable. She might possibly be held to be a creditor of Daley. Even to make her a creditor the evidence falls short. *She paid out the money willingly, under no contract, and shared with him the consumption of the same.* There is no implied contract in those facts.

The evidence falls short in tracing her money into any particular piece of the real property. The Irish Mag claim was located January 1, 1886, and the George Washington January 1, 1887. This was before they had become husband and wife, conceding all she claims, and the Irish Mag before they lived together at all. Her money cannot be traced into these. Hence, there can be no trust as to them. It is no better as to the others, as she says herself they lived up the money for board and clothes.

Again, her bill for divorce and her suit against Daley, Mehan *et als.* makes no such claim. She there claims that she had invested $3,000 in the acquisition of the claims, and that she owns half subject to the $3,000. She did not then think she owned them; had no conception that she had a trustee. That was an afterthought.

The record in the divorce suit was not competent. It was *res inter alias acta.* Cohn is not bound by it. If it is

competent to prove marriage, this is not the way to prove it. This was error.

The court erred in refusing to permit questions to Mrs. Daley asking if she had not sworn before the coroner that she was not married to Daley. She was a party. These declarations are competent as admissions, if it was competent to prove marriage. The court below held that as in the divorce case the court had held she was Daley's wife, the contrary could not be shown. But Cohn was not a party to it and so was not bound by the decree. Same is true as to case of Daley *vs.* Mehan *et als.*

The court erred in admitting the deposition of Mehan contradicting the deed under which he held. He could not vary it by parol.

No trust under the facts shown by testimony exists. The only other point in the case is:

Was appellant concluded by the judgment in the case of Angela Dias or Daley *vs.* A. J. Mehan, Daley, and Turner?

In other words, was Cohn, being prior lienholder, compelled to take notice and appear in a case to quiet title to the property in controversy by reason of *lis pendens* filed by Daley or Dias *vs.* Mehan?

On this point the facts are: While Mehan had the legal title by deed from Daley, Cohn levied an attachment on the premises and obtained judgment and advertised the property for sale. After our judgment and after the advertisement of the property for sale under it, Angela Dias or Daley, the appellee herein, a few days before the sale, brought suit against Mehan *et al.*, in which she claimed $3,000 as her separate property expended on the mines, and asked a sale of the property, and that she be declared half owner of the remaining proceeds under the law of community property rights. On filing the suit a *lis pendens* was also filed. Cohn was not made a party to that suit. We were valid prior lienholders of the legal title, and no suit to quiet title brought subsequent to our lien of record could possibly conclude us

unless we were made parties to the action. This is elementary, and amazement follows any serious denial or dispute of so manifest a principle.

A *lis pendens* is not a summons. It serves no such purpose. It orders nobody into court. It concludes or settles no pre-existing liens. It is a notice to subsequent lienholders or purchasers. It operates as a notice only from the time the complaint is filed, and of such facts only as are alleged in the pleading.

Walker *vs.* Goldsmith, 12 Pac., 538.

A *lis pendens* amounts to constructive notice of the claim of plaintiff to an interest in land. It is a warning to all who deal with it *thereafter* that they deal in peril of plaintiff's claim. It is not a warning against what has been done. It cannot change existing rights.

We repeat a *lis pendens* is not a summons to prior lienholders to come into court at the suit of anybody who wishes to question the title to the property. Collusive suits to defeat a lien could be filed as often as avarice or rascality might suggest, and the prior lienholder, failing from the want of actual notice or from any cause to appear and answer in every case, would be concluded by the judgment and robbed of his money.

Such monstrous effect could never be contemplated by an honest man and will certainly never be aided by a court of chancery.

There is not a case cited by counsel that decides any such thing as he contends for in this case. He relies principally upon Missouri cases that do not reach the point, for under the Missouri statute no lien is created by the levy of an attachment. No case can be found that holds squarely that a valid pre-existing lienholder is concluded by a suit to which he is not made a party, or that any lien can be divested in a suit to which the lienholder has not been called upon to appear and set out the nature of his claim.

If we held a prior lien we were not concluded by the suit of Daley *vs.* Mehan. If we did not hold a prior lien, the *lis pendens* was a notice and we were concluded. Ours was a valid prior lien with notice to the plaintiff who filed the *lis pendens.*

Our statute differs from that of most other States. It says in express and unequivocal terms: "The execution of the writ of attachment *shall create a lien* from the date of the levy on the real estate levied on." The court must repeal this statute or concede us a lien. Our statute is taken verbatim from Texas, and the court in that State decided expressly in Baird *vs.* Tice, 51 Tex., 555, that the lien arising from levy of attachment was as valid and as effective for all purposes as one arising from a valid mortgage duly recorded.

The principle for which we contend is well illustrated and decided in the case of Randolph *vs.* Duff, 21 Pac., 610, where it was held that a mortgagee of land fraudulently conveyed must take notice of a suit brought against the fraudulent grantee by the real owner of the land to declare to the legal holder a trustee when such suit is brought and *lis pendens* filed *before* any action to foreclose the mortgage is brought. If, however, the action to foreclose had been brought, and, to make it on all fours with this case, judgment had been obtained by the mortgagee, then the mortgagee would and could only be concluded by making him a party.

We purchased at the sale under our attachment and received a deed in the time and manner prescribed by law. We were *bona fide* innocent purchasers.

I call the court's attention to section 2601 Revised Statutes of Arizona, and also especially to the case of Jerome *vs.* Carbonate National Bank, found in the 43 Pac. Rep., page 215 (pamphlet No. 2, February 6, 1896), where it is squarely and correctly held that an attachment creditor is a purchaser under that statute, and that an attachment lien holds against

an unrecorded deed and is of the same rank with a judgment.

Even if there were a secret trust in this case, as was at first contended, our lien would be good against it unless we were divested or subrogated to other rights by judgment in a case to which we were parties.

It follows, then, that we were not concluded by the suit of Daley *vs.* Mehan, not having been a party to it, and that we took a good title to the property at the sale under our judgment. This being a case of first impression in Arizona, it is hoped that it may be decided on principles which will declare to bench and bar that a pre-existing lien of any kind on real property in that Territory can be divested or destroyed only by process of law; that such lienholders to be concluded by any suit touching the property must be served with summons and given their day in court.

Any other course means, in many cases, nothing more nor less than confiscation. Any other holding would open wide the gates of fraud and invite an entrance to every dishonest mortgagor and rascally debtor who pleases to bring collusive suits and rob absent and innocent lienholders of their property.

The supreme court of Arizona, in affirming the judgment of the lower court and reversing at another time the judgment of the lower court, and at a subsequent term again affirming the judgment of the lower court, from which last judgment this appeal is taken, decided that the appeal to that court was in all respects proper and regular. If the appeal had been irregular or any valid objections raised against the record, the appeal would have been dismissed. In that case there would have been no necessity for affirming or reversing the judgment below. On page 112 of the Transcript the following order is found:

"Be it further remembered that on the 31st day of July, 1895, the same being one of the judicial days of the July

term, 1895, of the supreme court of Arizona, the following proceedings were had in said cause in said court, to wit:

"In this cause the motion of appellant herein for rehearing filed herein having been fully considered by the court and the court being fully advised in the premises, it is ordered that said motion be, and the same is hereby, granted, and that the judgment of the lower court in this cause be, and the same is hereby, *reversed and cause remanded* for new trial in the court below, and it is ordered, adjudged, and decreed that the appellant herein do have and recover of and from the appellees herein his costs incurred in this cause in the lower court and the sum of forty-eight and $\frac{50}{100}$ dollars, his costs in this court."

On the 2d day of August the appellee there served on opposing counsel and filed the following motion (Trans., p. 112):

> Now comes defendant and appellee Angela Dias and moves this honorable court to set aside and annul the order and judgment made and entered in this cause in this court on the 31st day of July, 1895, reversing the former judgment of this court, made and entered on the 13th day of July, 1895, on the following grounds, to wit:
>
> 1st. That said order and judgment of July 31 was made inadvertently, unadvisedly, and without authority of law—
>
> In this, that after the judgment of this court was made on July 13, 1895, affirming the judgment of the lower court, counsel for appellant, Adolph Cohn, on the 15th day of July, 1895, in open court, prayed an appeal from said judgment to the Supreme Court of the United States, which was granted by the court, and the appeal bond fixed at $1,000, to be approved by the clerk of this court.
>
> That thereafter, on the 23d day of July, 1895, the attorneys for said appellant, Adolph Cohn, filed in this court a motion for a rehearing of said cause, and on this motion the order and judgment of July 31 was

made and entered, without service of said motion or any notice thereof to said Angela Dias or her attorneys, as required by paragraph 956 of the Revised Statutes of Arizona, and the said order and judgment of July 31, 1895, was made in less than ten days after said motion was filed, contrary to the provisions of paragraph 958 of the Revised Statutes of Arizona.

This is no application for a rehearing and conforms with no statute and with no rule of court.

On the 15th day of August the appellee filed the following alleged motion for rehearing (Trans, p. 113):

> Now comes Angela Dias, appellee above named, by her attorneys, James Reilly and A. R. English, and moves the above-named honorable court for a rehearing of the above-entitled cause on the following grounds, to wit:
>
> That the judgment made and entered in the records of the above-named honorable court on the 31st day of July, 1895, reversing the former judgment of the same court, was without jurisdiction and void, in this:
>
> 1st. Said judgment of reversal was made on motion of appellant for a rehearing, which was not served, nor any notice thereof given to said Angela Dias or her attorneys or either of them.
>
> 2d. Said judgment of reversal was made in less than ten days after the filing of appellant's motion for a rehearing of the case, and paragraphs 955, 956, and 958 require that service of a motion for rehearing shall be made on the adverse party or his attorney, and that the rehearing shall be had in not less than ten days after the return of service.
>
> 3d. The judgment of the above honorable court, made and entered on 13th day of July, 1895, affirmed the judgment of the lower court, and appellant, Adolph Cohn, appealed therefrom to the Supreme Court of the United States and prayed the above honorable court to allow his said appeal, and the court allowed the same and fixed the appeal at $1,000.

The judgment reversing the decision of the lower court was rendered at the July term and the court adjourned. When the January term was convened the court reheard the cause, notwithstanding our objection, and rendered a judgment, from which this appeal is taken. We denied the jurisdiction of the court and made at the time the following argument, which the clerk has inadvertently incorporated in the Trans., p. 116:

That the said court at this term of the court has no jurisdiction over the records of the last term of the supreme court of this Territory.

It is familiar doctrine that every court has absolute control over its records and its proceedings during the term, and not after the term has adjourned, and during the term has the right to amend, set aside, or annul all orders or decrees made in a case. This is an inherent power which cannot be abridged, taken away, or lost by any act of either party. A party taking steps to perfect an appeal does not take away the power of the court over the case during the term.

In contemplation of law a term of court is one day.

It is hardly necessary to cite authorities for a proposition so familiar. The law and cases cited will be found in vol. 12, Encyc. of Law, p. 90, and vol. 25, Encyc. of Law, p. 120. I will cite two cases:

Manchester *vs.* Herrington, 78 N. Y., 194.
Cheniquary *vs.* People, 78 Ills., 570.
Barrell *vs.* Tilton, 119 U. S., 637.

Every court *a fortiori*, a court of last resort, has the right and the power, and, more, it is its duty, at any time during the term, if it finds it has made a wrong decision, to make a new and correct one. The records of this case show that it has been before this court for a long time. It was submitted to the court on briefs and argument. A rehearing was granted and again submitted to the court on briefs and

argument. During the last term of the court, the court announced that it had reached the conclusion to affirm the decision. Appellant filed a motion for a rehearing. It was done during the term, and my recollection is the filing of the motion was announced in open court in presence of Mr. Reilly, attorney for appellees. It is possible I am mistaken in this. The court took a recess until July and then convened again in the same term of court. Just what the order made was I do not know, as I have not the records before me. If I recollect the announcement from the bench correctly, it was stated that the court had concluded to grant a rehearing and stated that, as the cause had been submitted to the court, the court had again considered the case and had reached a conclusion to reverse and remand the case for trial. In my view of it the motion for rehearing cuts no figure in this matter at all. As said before, the court had power during the term to set aside the order of affirmance and to order that the cause be reversed. It was the duty of the court to do so if the court came to the conclusion that that was a proper judgment in the case, and when that term adjourned the court had no longer power over the case, as by the adjournment of the term the case had got beyond the jurisdiction of the court.

The only power otherwise after the term is the power granted by statute, secs. 954–958, to consider and pass upon a motion for a rehearing at the next term of the court. The appellees' motion filed on the 15th day of August, 1895, while it purports to be a motion for a rehearing, is not a motion for a rehearing in any sense.

It does not state the grounds on which the party relies; it does not point out to the court any error made in its decision; offers no ground or reason why the cause should not be reversed and remanded, but it simply points out that the motion for rehearing was heard prematurely, and argues that the court had no power then to grant a rehearing;

hence this motion ought not to be considered as a motion for a rehearing.

It seeks to attack the power of the court to set aside its order, and we have shown above that the court had the power during the term to set aside the order of affirmance and to make an order of reversal.

Neither the appellee nor his attorney has filed, as we are advised, any affidavit or evidence to show that the motion for rehearing was not served upon the attorney for appellee. Whether the record is silent upon that point I do not know, but I do know that a copy of the motion for a rehearing was mailed to James Reilly, attorney for appellee, long before the order was made in July. I admit this is outside the record, but counsel should not be permitted to deny the service of a motion for a rehearing without offering the affidavit of somebody denying that they had notice of the motion. While the statute in secs. 955, 956 points out how a motion for a rehearing may be served, if there be actual service that particular method is not necessary. If the motion is made in open court in presence of counsel of the opposite side, counsel is charged with the knowledge of the procedure in open court. If service be made by mailing a copy and he received it, that would clearly be good service. If a copy be handed to the party or his attorney, that would be good service, and a party saying he had not been served should show it by affidavit; but without regard to any motion for rehearing and outside of it all, the case was submitted during the term by parties upon their briefs. The cause was in the hands of the court; the court had full power over it. It did not lose power over it when it made an order affirming the judgment, and at any time *during the term* with or *without* a motion for rehearing it clearly had power to set aside its order and make a different judgment. The statute of Arizona as to rehearing extends that power over to the next term of the court if its provisions be complied with. They were not complied with, as no *motion*

for rehearing that the court could justly consider had ever been made.

The various contradictory judgments of the court put this record in a confused light and render it somewhat unusual in length, when we contemplate the only two questions originally involved, to wit:

1*st. Is the appellant Cohn concluded from asserting title to the mining claims in question by virtue of a judgment rendered in the action to quiet title of Angela Dias vs. Mehan, Turner, and Chandler; to which action he was never made a party, though at the time suit was filed he held a valid lien on the identical property?*

2*nd. Was Daley a trustee for his alleged wife under the admissible evidence in this record* to the extent that the trust was a charge on the deed from Daley?

We think we have fully answered both these questions, and will only add that if Turner and Chandler, who held deeds from Mehan, were not bound by the *lis pendens* set up by appellee and were necessary parties to the action of Mrs. Daley *vs.* Mehan *et al.*, then neither is Cohn *a valid lienholder*, bound by the *lis pendens*, and he was a necessary party to the same suit. If Turner had not been made a party, he would not have been affected by the judgment, whether *lis pendens* was filed or not. Neither can Cohn be affected by the judgment, a lien in his favor having attached long before any suit was brought by Mrs. Daley or *lis pendens* filed by her, and we repeat here and emphasize the fact *that the lis pendens was filed on a complaint that gave no notice of any trust.* (See Supplement to Transcript, page 91.) The paper filed "Supplement to record" is a certified part of the transcript in this case. Amended answer in this case was by mistake of clerk omitted, and which could have been ordered up by suggestion of diminution of record, or filed, properly certified, without that.

The appellee does not meet the case as disclosed by the proof. With our recording acts looking them in the face,

they seem to claim that a judgment creditor of the owner of real estate in fee, as the record shows, if he levies, is to be defeated by *a secret trust resting purely and solely in parol.* This is a most dangerous doctrine, and shakes all land titles to their center, and puts parties at the mercy of uncorroborated swearing.

The adventuress living and cohabiting with a prospector in a mining camp swears she had $3,000. She is uncorroborated. Every fact surrounding her contradicts her oath. If she has any claim whatever, it is a money demand for such sum as she can show she *actually spent on the mines.*

The absence of the citation from the transcript is explained by the affidavit of the clerk of the supreme court, found on page 121 of the transcript.

Respectfully submitted.

BARNES & MARTIN, and
MARCUS A. SMITH,
For Appellant.